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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 213.

E. J. STANTON & SON,

Plaintiff and Petitioner,

vs.

COUNTY OF LOS ANGELES and CITY OF LOS ANGELES,

Defendants and Respondents.

PETITIONER'S ANSWERING BRIEF.

The California decision in the case at bar deprives plaintiff of a fundamental right secured by specific constitutional provision. This was asserted in the petition and not denied by respondent. The respondent's brief is rather a plea of confession and avoidance. The conflict between the decision of the California court in the case at bar with the decisions of the Federal Circuit Courts of Appeal and with the decisions of six other state courts is asserted by the petition. This respondent does not deny. Never has this court passed upon the immunity of an importation of fungible goods when a part has been sold. This is a vitally important question in the import-export trade. Respondent does not deny this. Mr. Justice Black has stated that a definite answer should be given to the importers and to the taxing authorities of the states.

I.

The History of the Rule in California.

The importance of the decision by this court is emphasized by the variance of the case at bar from former California decisions.

Imperial Dev. Co. v. Calexico, 47 Cal. App. 666;

Imperial Dev. Co. v. Imperial Co., 47 Cal. App. 794.

From the reading of the opinion of these cases it appears that cotton and boles were imported at different times from Mexico. At all times the imports were open for sale and sales made. The court held this to be immaterial so long as the goods were marked for identification and in the original package "under such circumstances it could not become so mingled with the other goods stored in the warehouse as to lose its character as an import while it continued to be the property of the importer."

So. Pac. v. Calexico, 288 Fed. 639;

Phil. Ref. v. Contra Costa, 24 Cal. App. (2d) 665.

Cocoanut oil was stored at San Pablo as a result of four different importations. Deliveries made to various purchasers. Held tax exempt under the Federal Constitution. The court therein relied upon:

Carson Petroleum v. Vial, 279 U. S. 95, 73 L. Ed. 626;

In re Taxes, 32 Hawaii 431;

Galveston v. Mex. Pet., 15 F. (2d) 208.

The last two cases are discussed in petitioner's opening brief. The *Galveston* case flatly distinguished the theory of the *Maine* case. It is reasonable to conclude that California thereby took its stand with those states and courts adverse to the theory that the entire shipment is considered as the "original package of import."

Johnson v. Los Angeles, 31 Cal. App. (2d) 579.

In this case the imports held tax exempt were an aggregate of imports over the period of a year, of twine, rope and cordage deposited in plaintiff's warehouse. Evidently there was no total shipment involved, but broken remainders of various shipments.

Dant & Russel v. Board of Supervisors, 21 Cal. (2d) 534.

The facts in this case were similar to that of the case at bar. Lumber from the Philippines the result of various importations over a period of three years, diminished by sales, was stacked in piles in a warehouse yard. Suit was to recover taxes paid. The case was heard upon demurrer to a complaint. Decision was for the county in the trial court. The District Court of Appeal reversed in decision noted at 128 P. (2d) 389 (not in official reports) and held:

> "It is our opinion that the original package was each individual piece of lumber, since the lumber was not bundled or in any manner bound together and was the identical thing delivered by the consignor to the car-

rier at the initial point of shipment and it so remained at all times here in question. There can be no doubt that, had one piece of lumber alone been shipped, it would have constituted the original package and not been subject to taxation under the facts set forth above. Had two or three or a dozen pieces of lumber been shipped, it is likewise obvious that each individual piece of lumber would have constituted an original package. The fact that there were thousands of individual packages did not change the character of each piece of lumber as an original package."

The California Supreme Court, in its decision above noted, held that inasmuch as the lumber came from the Philippine Islands and the Islands were a possession of the United States, the lumber did not come from foreign lands and was not imported. The rule under the import-export clause of the Federal Constitution did not apply, but the rule in the Interstate Commerce Clause did apply. The lumber admittedly had come to rest. It was therein held that it thereby became subject to the state tax. The decision did not at all deal with any of the points determined by the Appellate Court decision. The actual effect of this case was to forecast the decision in the case at bar.

II.

Respondent's Erroneous Views.

The respondent's brief was evidently prepared by new counsel who evidently had no time to examine the findings, evidence or exhibits. For this reason he has made statements which were not quite in accord with the facts at issue and has found it necessary to pad his brief with identical excerpts from the decision. His errors in this respect are noted.

Evidence as to Marks: The fact that each parcel of lumber at the time of the tax bore the identification marks of the exporter is alleged in the complaint [Tr. p. 3, par. 3] also Exhibit A [Tr. p. 11]. This was not denied in the answer. It was found, in accordance with the admission of the pleadings, to be true in the Findings. [Tr. p. 32, par. 3]. Petitioner's statement is correct. It is borne out likewise by the exhibits produced in evidence.

The Grounds of Decision: The rather ambiguous holding of the court may well be thought to embrace two grounds. The ground which respondent emphasizes is at flat variance with the findings of the trial court [Tr. p. 35]:

> "That until and on said 3rd day of March, 1941, each of said parcels of lumber remained the property of plaintiff in the original form of package in which it was imported as aforesaid and in which said parcels of lumber were delivered to the carrier by the consignor as aforesaid, and in which they were carried by the carrier as aforesaid from the respective dates of importations to the respective points whence said importation was made and was particularly identified in said location by said marks upon said lumber placed thereon by the consignors as aforesaid and by the location allotted for the storage of said lumber; that

said marks of identification upon said lumber showed, among other things, that it was the product of the Philippine Islands, Thailand, Australia, Guatemala and Ecuador, respectively; that at all times said lumber was stored separate and apart from and not mixed or mingled with any other than single, original packages of importation or importations of lumber theretofore made from the respective shippers, respectively, from the Philippine Islands, Thailand, Australia, Ecuador or Guatemala, as the case may be; that is to say, there was no intermingling with importations from the respective foreign ports of origin; and the lumber from each of said foreign ports of origin was kept separate and apart from any other lumber; that no change has been made in the form of said lumber since it was unloaded from the steamship carriers; that said lumber has not been offered for sale and had not been sold; that the destination of said lumber within or without the State of California was undetermined; that said lumber on said 3rd day of March, 1941, had not been incorporated into the mass of the property within said State of California; that no change had been made in the form of said lumber since it was unloaded from the steamship carriers; * * *"

These findings are intrenched in the undenied allegations of the complaint. The answer solely put into issue the point that lumber had been sold from the stacks and the total shipment broken.

The Questions Presented: These obviously refer to all fungible importations and present the general aspects for the decision. Each of these questions, in so far as the case at bar is concerned, obviously refer to and include only the lumber importation in question.

The Passage Through the Customs by Package: The statement contained in the petition is proven adversely to the respondent's contention by the documentary exhibits of the shipping papers. These documentary exhibits were in the form prescribed by the customs code noted in the opening brief.

The Sale or Offer for Sale: As noted in the excerpt from the findings, there was no evidence introduced of the sale or offering for sale of any one or any part of the lumber on hand. Views of the respondent are entirely his own and not based upon any evidence produced.

The Processing: As noted in the quoted findings, there was no processing. In fact, oral testimony was that the newly imported lumber was sold for exactly the same as that which had been in stacks.

The Commingling: As noted by the Findings in the trial court, there was no commingling.

The Transportation: Careful inspection of the oral evidence shows that there was no evidence whatsoever as to the manner in which the shipments were maintained and whether packed, unpacked or otherwise. There was documentary evidence as noted in the opening brief that shipments from three importers were combined in one import and one shipment was broken prior to customs entry.

The Sorting for Grade, Thickness and Color: The sole evidence was both documentary and oral, that the sorting for thickness, grade and color was made, in conformity to the invoices, by the exporter as necessary to pass through customs. The marking on the planks, placed by the exporter, indicated their quality and color. Upon arrival this original sorting was merely checked by the importer.

III.

Deprivation by Said Court of the Fundamental Constitutional Right Vests This Court With the Power to Review the Evidence and Reach Its Own Conclusions.

This point was noted in appellant's opening brief, page 22. The respondent's brief refers rather to diversity of citizenship cases. This court has recently epitomized its holding in the late case of *Fay v. New York,* Vol. 91, Adv. Sheets, p. 1517:

> "We would in any case be obliged, on a constitutional question, to reach our own conclusions after full allowance of weight to findings of said case, and in this case must examine the evidence."

The respondents here rest upon a ground which was not placed in issue in the pleadings or in the trial court. The sole issue there was the break in the original shipment, plaintiff maintaining that each plank constituted an original package, the taxing authorities contending that the entire shipment constituted the original package. The trial court held in accordance with petitioner's theory and further held, as noted above in the excerpt from the findings, that each plank was in the exact condition as delivered by the exporter to the carrier, as carried by the carrier and delivered through customs to the importer. As stated under the doctrine of *May v. New Orleans,* 178 U. S. 496, each plank was the original package of import. The theory of respondent was dispelled by the documentary evidence produced, which has been above noted, showing the manner in which the shipments were originated, marked and imported through customs.

Under this situation, petitioner agrees with respondent that a determination of this court is needed. It is to be noted, however, that the cases cited by respondent under their paragraph 3, page 21, relate, as to the first three shipments to the interstate commerce rule, and are not at all helpful in a case arising under the interpretation of the section relating to the immunities upon importations. The case of *May v. New Orleans, supra,* is directly contrary to the contention of respondent in that the holding of that case was to the effect that the original package of import is that which is utilized by the carrier in transporting merchandise and delivering it into this country.

Conclusion.

The questions here presented are of that National importance which requires the determination of the final Constitutional arbiter. The issues are clean-cut and definite. There is a radical division among the States and Courts upon diametrically opposed theories. The expanding foreign commerce of the Nation collides more and more with the increasing State tax requirements; the State taxing authorities encroach more and more upon the resources reserved to the Nation. All of these needs coalesce into an insistent demand for the reasoned opinion of the High Court.

Respectfully submitted,

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By .....

and

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